(2)

No. 91-695

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1991

ISAIAH THOMPSON,

Petitioner,

vs.

JANINE THOMPSON,

Respondent.

Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Sixth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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STATEMENT OF THE CASE

PROCEDURAL HISTORY

Plaintiff-Respondent Janine Thompson (hereinafter respondent or Ms. Thompson) filed this action on October 17, 1984 against petitioner State Representative Ike Thompson (hereinafter petitioner or Rep. Thompson) and Thomas Winters (former Executive Secretary of the Ohio House of Representatives). Respondent alleged, pursuant to 42 U.S.C. §1983, a denial of equal protection guaranteed by the Fourteenth Amendment to the United States Constitution. Respondent further alleged pendent state claims of assault, battery, invasion of privacy and intentional infliction of emotional distress.

On October 2, 1985, respondent was granted leave to file her amended complaint which added a defendant, the Ohio House of Representatives, and a Title VII, 42 U.S.C. §2000e, claim against all defendants, following respondent's receipt of a Right-to-Sue letter.

The trial court subsequently dismissed the Title VII claims against the defendants Ohio House of Representatives and Thomas Winters by order dated June 8, 1988 on the basis of the personal staff exemption, 42 U.S.C. §2000e(f). On August 22, 1988, the court modified its June 8, 1988 order and dismissed most of respondent's 42 U.S.C. §1983 claims against defendant Winters. The respondent voluntarily dismissed her remaining claim under 42 U.S.C. §1983 against Winters.

The case proceeded to a jury trial on December 4 through 7, 1989. The 12 member jury reached a unanimous verdict on December 7, 1989 holding petitioner liable for denial of respondent's right to equal protection under the Fourteenth Amendment on account of sex pursuant to 42 U.S.C. §1983. The jury awarded respondent $55,000.00 in compensatory damages and $50,000.00 in punitive damages. On December 8, 1989, the trial court entered judgment for respondent in accordance with the jury verdict.

On March 13, 1990, the trial court denied petitioner's motion for judgment notwithstanding the verdict or for a new trial, and petitioner appealed.

FACTUAL BACKGROUND

The case below was brought by respondent on the basis of repeated and outrageous sexual harassment by petitioner State Representative Ike Thompson. The evidence presented to the jury included numerous instances of sexual demands, threats, and verbal and physical assaults by petitioner against respondent.

In addition to Ms. Thompson's testimony, respondent proffered the testimony of two former employees of petitioner who had both experienced remarkably similar sexual harassment at the hands of the petitioner. Patricia Stephens, a former secretary to petitioner, and Noel Williams, a former legislative aide to the petitioner, were both prepared to testify regarding the sexual demands, insults, innuendoes and

physical conduct of petitioner, including Ms. Williams' termination after she complained (Excerpts at 5-10).[1]

The respondent, who is not related to petitioner, began working for the Ohio House of Representatives in May of 1983 (TR I-5, 13).[2] Rep. Thompson immediately inquired into Ms. Thompson's personal life when he interviewed her. He asked her if she was married or had any boyfriends. He said that he did not want other persons to have priority in her life because she would be expected to accompany him after office hours (TR I-12). Rep. Thompson stated in the beginning of respondent's employment that "he was responsible for me getting the job and that I owed him" (TR I-13).

Ms. Thompson went to work for petitioner as his legislative aide in May 1983. She managed his office, staff, and handled his constituent problems. She did writing for him, reviewed legislation and made reports on legislation coming before

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[1] "Excerpts" refers to the portions of the trial transcript not originally ordered by petitioner and consists of the respondent's proffer of evidence of other women who were sexually harassed by petitioner. "Excerpt Transcript" refers to the additional portion of the transcript consisting of opening and closing arguments and jury instructions.

[2] Reference to the trial transcript shall be designated by "TR" followed by the volume and page numbers.

the Transportation Committee, which Rep. Thompson chaired. She also attended Committee hearings (TR I-14, 16).

Rep. Thompson told Ms. Thompson during the first month of work that she was doing a good job (TR I-18). At the end of her probationary period, Ms. Thompson received a raise and Rep. Thompson told Mr. Winters that she was doing a good job (TR II-94). Rep. Thompson never complained to Winters about any problems with Ms. Thompson's work until after respondent complained about the sexual harassment (TR II-126).

Rep. Thompson began to subject Ms. Thompson to sexual harassment shortly after she started working for him. He often told Ms. Thompson how attractive she was and that she should not wear pants; he had an office rule against it because he liked to look at legs. He further informed respondent that she would be fired if she dated anyone in state government (TR I-18). On cross examination, respondent recalled how jealous Rep. Thompson became when men stopped by the office to talk with her (TR I-101).

A few weeks after respondent started her job, Rep. Thompson informed her that he wanted to review with her that evening the next day's committee work. He informed respondent she would accompany him to dinner (TR I-19). Ms. Thompson was not concerned at first, because she had worked with men on the road before and had often worked in restaurants and hotels (TR I-20).

However, the legislation respondent had brought with her was not discussed at dinner. After dinner, Rep. Thompson said he wanted to work in his room so he could watch a baseball game on television (TR I-19-20).

When they arrived in petitioner's room, he turned on the game, and to respondent's shock, undressed down to his underwear. He told her he wanted to get "comfortable" (TR I-20); he directed respondent to do likewise. She refused and sat in a chair (TR I-22). Rep. Thompson then grabbed respondent by the arms, pulled her on the bed, unbuttoned her blouse and bra, and fondled her breasts (TR I-12). Respondent resisted, wrestled free and demanded to be taken home (TR I-22-23). At no time did respondent consent to petitioner's outrageous conduct. Rep. Thompson never mentioned the legislation that entire evening (TR I-21, 24).

Ms. Thompson did not complain to anyone about Rep. Thompson's behavior for several weeks because she was humiliated and felt that she should have been able to handle the situation. Finally she confided in a long time friend of her family, Mrs. Robbie Cromwell, in whose house she was living, about what had happened (TR I-24).

The sexual harassment continued. On several occasions, Rep. Thompson summoned respondent into his office ordering her to close the door. He repeatedly tried to put his hands up her skirt or down her blouse. He continually made sexually

suggestive remarks, and said that he expected the two to have a romantic relationship (TR I-25). He tried to kiss respondent and wanted her to sit close to him in his office. At social events, he tried to hold hands with respondent. Ms. Thompson did not consent to any of this conduct (TR I-25, 26). Rep. Thompson's demands went so far as to require respondent to cut the hair out of his ears (TR I-28). On several occasions, Rep. Thompson called his Columbus office from Cleveland. During the conversations he informed respondent that if she did not go to bed with him, she would lose her job (TR I-25).

Rep. Thompson eventually started calling respondent at home at all hours of the night. He often called her in the middle of the night ordering her to meet him at the Clarmont Hotel where he was staying (TR I-27). Mrs. Cromwell overheard two of these calls. On one occasion, respondent asked Mrs. Cromwell to listen on the extension phone (TR I-154). Mrs. Cromwell heard Rep. Thompson tell respondent how much he liked her and that he wanted her body. Respondent informed Rep. Thompson that she only wanted to work for him and was only interested in doing a good job (TR I-155). Rep. Thompson responded that respondent's work was fine but that he was interested in her personally (TR I-155, 157; TR I-47-49).

Janine Thompson testified that she never saw Rep. Thompson touch any male employee of the Ohio House of Representatives in a sexual way (TR I-29).

Rep. Thompson also told respondent to accompany him on trips out of town. The first trip was to Sacramento, California a few months after respondent commenced her employment at the House of Representatives. Respondent informed Rep. Thompson that she did not want to go because of the sexual harassment that she had encountered, but he informed her that she had to accompany him (TR I-30).

Ms. Thompson consulted Tom Winters, Executive Secretary of the Ohio House of Representatives, about whether she had to go on the trip to California, relating to him the incidents at the Clarmont and the offensive conduct which had occurred in the office. She told him she did not want to go on the trip (TR I-36).

Ms. Thompson testified that Mr. Winters was noncommittal, not wanting to get personally involved. She felt that if Mr. Winters was concerned about her situation, he would have spoken with Rep. Thompson (TR I-36). Instead, Mr. Winters told the Respondent that the trip was not in her job description so she did not have to go. She told Rep. Thompson what Mr. Winters had told her, to which Rep. Thompson responded that she worked for him, not Tom Winters, and that if she did not go, she would not be working for him (TR I-37).

Respondent also sought help in alleviating the situation from John Thompson, another state representative who was a good friend of petitioner. John Thompson reported to respondent that he could get nowhere with the petitioner

because the petitioner was obsessed with having her (TR I-34).

Respondent's fears were confirmed upon her arrival in California. Petitioner met her in the lobby of the hotel, whereupon he immediately talked to the desk clerk about having her assigned the room next to his. That room was not available so respondent took one down the hall (TR I-38).

Rep. Thompson asked respondent to stop by his room when it was time to go to dinner. He met her at the door in his underwear and invited her in. Respondent, still thinking that she could handle the situation, went into the room. Petitioner again tried to coerce respondent onto the bed. He started kissing her. When she resisted, he said that she was not appreciative of the trip (TR I-39, 40).

When Ms. Thompson again informed Rep. Thompson that she was not interested in a romantic relationship, he suggested that they have oral sex. After this incident, respondent felt the situation was hopeless. She had been rude to petitioner, she had called him names, but he still persisted (TR I-41-42).

Upon her return to Columbus, the harassment continued. Respondent continued to resist petitioner's advances, but he kept telling respondent that she was not appreciative of him. He told her that she would have to leave, take a transfer or find another job (TR I-44).

By the fall of 1983, Ms. Thompson had talked to Tom Winters and other state representatives requesting their help in getting out of the petitioner's office (TR I-49). She repeatedly tried to get in to see Mr. Winters again but could not get an appointment until January, 1984 (TR I-55). She informed Mr. Winters that the sexual harassment was continuing and that she wanted to get out of the office (TR I-56). Mr. Winters wondered if she would take a caucus aide position. Respondent did not want the caucus aide job, because it was a demotion to an entry level position (TR I-56).

Mr. Winters acknowledged that Ms. Thompson was visibly upset when he saw her. She was emotionally upset, crying and trembling (TR II-70). The meeting created enough of an impression on Mr. Winters that he consulted his personal attorney as well as his wife, who is a labor lawyer (TR II-69).

However, Mr. Winters did not offer to take any action on behalf of Ms. Thompson (TR I-60). Instead, he wrote the respondent a letter that seemed more intent on protecting himself, confirming that he had met with respondent, and falsely stating that he had offered to investigate (TR I-62; respondent's Exhibit 6). To add insult to injury, Mr. Winters prepared a response letter, which he proposed that Ms. Thompson sign to acknowledge receipt of his letter (TR I-63; respondent's Exhibit 7). Respondent refused to sign this acknowledgement. Mr. Winters became angry at her refusal to sign the letter (TR I-63, 64).

Mr. Winters confronted Rep. Thompson about the respondent's complaints ten days after his January meeting with her (TR II-87). The petitioner was upset and told Mr. Winters that every time he asked respondent to do something, she would scream at him (TR II-87).

Despite meeting with Mr. Winters in January about the respondent's complaints of sexual harassment, Rep. Thompson continued to pressure respondent to take trips or spend weekends with him (TR I-67-69).

In March, 1984, following a dispute with petitioner over his demand that she spend the weekend with him, the respondent and petitioner decided to talk with Mr. Winters (TR I-72). Ms. Thompson reminded Mr. Winters about the harassment that she had previously complained to him about (TR I-72; TR II-89). The petitioner denied Ms. Thompson's accusations (TR II-77).

As a direct result of Rep. Thompson's sexual harassment, respondent was transferred to a caucus aide position in March 1984, a position with no duties. Ms. Thompson viewed the new position as a demotion or worse, because she had no substantive duties (TR I-75, 79). She did not go back to Mr. Winters because she felt she was being punished. In addition, many people stopped talking to her. Respondent resigned from her position in the House of Representatives in April, 1985 because of the treatment that she had received and damage to her career caused by petitioner (TR I-85, 95, 143).

At trial, respondent presented considerable evidence on damages. As petitioner is not challenging the jury's award of damages, that evidence is not relevant to this petition except for a few points. Respondent sought psychological counseling from Dr. Deborah Emm, a licensed psychologist. Respondent told Dr. Emm about the sexual harassment that she had suffered at the hands of Rep. Thompson. Dr. Emm diagnosed respondent as suffering from post traumatic stress disorder as a result of this treatment (TR II-21). Respondent was extremely anxious and visibly distressed, was experiencing considerable fatigue (TR II-15), was having trouble sleeping (TR II-23), and was suffering from eating disorders (Id.). Dr. Emm also testified that in her professional opinion, respondent was telling the truth (TR II-17). Dr. Emm testified that respondent's descriptions and condition closely matched what a psychologist would look for in a person who was a victim of sexual harassment (TR II-17).

SUMMARY OF THE ARGUMENT

This Court should deny the petition, which is based on what petitioner claims is an erroneous jury instruction, because the petitioner failed to raise any objection to the trial court's jury instructions. The failure to object to instructions precludes petitioner from challenging the instructions on appeal.

In addition, there was no error in the trial court's instructing the jury on sexual harassment. All federal appellate courts that have considered the issue have held that all forms of sexual harassment, including harassment that adversely affects the job (which has been labeled quid pro quo sexual harassment) is covered by the Fourteenth Amendment of the Constitution. There are no cases to the contrary. Therefore, there is no uncertainty among the circuits for this Court to resolve.

REASONS FOR DENYING THE WRIT

I. Petitioner Failed To Object To The Court's Jury Instructions On The Issue Of Quid Pro Quo Sexual Harassment And Is Therefore Precluded From Raising Any Assignments of Error Related To This Issue

As the Sixth Circuit Court of Appeals correctly recognized, petitioner cannot claim on appeal any defects in the trial court's instructions to the jury because he failed to raise objection to the instructions given by the court. Counsel for defendant stated that he had no objection to the jury instructions during a bench conference on the instructions (Excerpt Transcript at 88). Furthermore, the record shows that at no time prior to the trial did the petitioner raise the issue, by motion or otherwise, that respondent's claims of quid pro quo sexual harassment failed to state a claim upon which relief could be granted pursuant to 42 U.S.C. §1983.[3]

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[3] Contrary to petitioner's assertions, petitioner never raised the Constitutional issues discussed in his brief in the trial court. The Motion for Summary Judgment (which also did not raise the precise issues argued by petitioner herein) was made by defendants Winters and the Ohio House of Representatives. See Opinion and Order of the United States District Court, June 8, 1988, attached at

(continued...)

Rule 51, F.R.Civ.P., states that no party may assign as error the giving or the failure to give an instruction unless that party objects to the instruction before the jury retires to consider its verdict. See Pet. for Cert., A-41. This Court has adopted a strict interpretation of Rule 51. City of Springfield, Mass. v. Kibbe, 480 U.S. 257, 107 S.Ct. 1114 (1987). In Kibbe, this Court held that it should be reluctant to hear issues not raised below, particularly if the party arguing the issue did not object to jury instructions. This Court did not mention any exceptions to the rule nor did it indicate that the plain error doctrine applied.

The Seventh Circuit Court of Appeals held that "in civil cases a plain error doctrine is not available to protect parties from erroneous jury instructions to which no objection was made at trial." Deppe v. Tripp, 863 F.2d 1356, 1382 (7th Cir. 1988). See also, Williamson v. Handy Button Machine Co., 817 F.2d 1290, 1295 (7th Cir. 1987).

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[3](...continued)
Appendix A-5 of Petition for Writ of Certiorari. Petitioner never moved for Summary Judgment nor moved to dismiss. Likewise, the district court never issued an order that respondent could not proceed against petitioner on her Title VII claims, on the basis of the legislative staff exemption because petitioner did not raise it. Instead, respondent abandoned this claim.

The Sixth Circuit Court of Appeals has followed the strict language of Rule 51 in holding that the "failure to object [to jury instructions] waives the right to appeal from an incorrect instruction." Roberts v. City of Troy, 773 F.2d 720 (6th Cir. 1985).

In Young v. Langley, 793 F.2d 792 (6th Cir.), cert. denied, 479 U.S. 950, 107 S.Ct. 436 (1986), the court held that "generally where a party fails to object to an instruction this court will not consider that objection on appeal." Id. at 795.

Some courts have, however, created exceptions to the rule that failure to object precludes a litigant from challenging an instruction on appeal. The Sixth Circuit Court of Appeals noted that where an error in jury instructions is obvious and prejudicial, an appellate court may consider the matter in the interests of justice even if the complaining party has failed to object. Id. at 795. The Young court, despite setting forth the exception, refused to apply it to the defendant on appeal because the defendant, like petitioner herein, had not raised the issue by objection to the jury instructions nor in a motion for judgment notwithstanding the verdict nor a motion for a new trial.

Other courts have held that the plain error doctrine applies where there is an intervening change in the law, see Ratliff v. Wellington Exempted Village School Board of Education, 820 F.2d 792, 796 (6th

Cir. 1987); and Silor v. Romero, 868 F.2d 1419, 1421 (5th Cir. 1989).

Even if this Court were to create a plain error exception to the failure to object to instructions, the exception does not apply to the case at bar. As the Sixth Circuit Court of Appeals held in the instant case, even if there was error "it was not obvious". (Petition for Writ of Certiorari, A-4), because courts had already held that quid pro quo sexual harassment was covered by the Fourteenth Amendment. See Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989) and Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988). Furthermore, there was no intervening change in the law between the time of the instruction and the time of appeal.

Finally, there can not be plain error, because federal courts have held the elements of sexual harassment contained in the instructions given by the trial judge are actionable under §1983.

II. "QUID PRO QUO" SEXUAL HARASSMENT CONSTITUTES AN ACTIONABLE CLAIM UNDER 42 U.S.C. §1983 WHERE, AS HERE, IT VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The Trial Court Instructed The Jury That Quid Pro Quo Sexual Harassment Required That The Harassment Be On Account Of The respondent's Sex, And The Jury So Found

The trial court in the case at bar instructed the jury on the elements of quid pro quo sexual harassment, without objection from petitioner:

> The second element of the plaintiff's claim is that Ike Thompson deprived her of a federal right by subjecting her to quid pro quo sexual harassment, thereby depriving her of the equal protection of the law. In order for the plaintiff to establish this second element, she must show five things by a preponderance of the evidence:
>
> First, that the plaintiff was a member of a class of persons protected by Section 1983 of Title 42;
>
> Second, the defendant subjected the plaintiff to

> sexual harassment in the form of unwelcome sexual advances or requests for sexual favors;
>
> Third, the harassment complained of was based on sex;
>
> Fourth, the plaintiff's submission to the unwelcome advances was a condition for receiving job benefits or the plaintiff's refusal to submit to the defendant's sexual advances resulted in adverse employment actions;
>
> Fifth, the defendant acted intentionally.

(Excerpt Transcript, at 48-49; see further elaboration by court at 49-52).

Petitioner ignores the abundant evidence, the explicit jury instructions, and jury verdict in attempting to rely on Huebschen v. Department of Health and Social Service, 716 F.2d 1167 (7th Cir. 1983).[4] In Huebschen, the court found that a female supervisor's treatment of a male employee was not sexual harassment, but resulted from the male employee's

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[4] In Huebschen, the court found that "the substantive basis of the 1983 claim is a violation of Title VII." 716 F.2d at 1170. Importantly, in the case at bar, plaintiff alleged and the jury found that the defendant's acts violated the Equal Protection Clause of the Fourteenth Amendment.

ending a consensual romantic relationship with the supervisor. Thus, the court found that the supervisor's actions were not based on the respondent's sex, but because of his having jilted her as a lover.

As the Seventh Circuit Court of Appeals later held, in a case petitioner ignored in his petition, Huebschen must be limited to the unique facts of that case. In Volk v. Coler, 845 F.2d 1422 (7th Cir. 1988), the court relied upon Bohen v. City of East Chicago, Ind., 799 F.2d 1180 (7th Cir. 1986) and stated that "discrimination and harassment against an individual woman because of her sex is a violation of the equal protection clause...Volk's sex is an immutable characteristic." (citation omitted, emphasis in the original) Id. at 845 F.2d at 1433.

Volk involved a factual setting similar to the facts in the instant case. The respondent in Volk brought claims under both Title VII and 42 U.S.C. §1983 for sexual harassment. Volk claimed that she rejected her supervisor's sexual advances, offensive touching, and crude remarks and displays, which resulted in a denial of promotion and an involuntary transfer. The court rejected the petitioner's attempts to rely on Huebschen stressing that Huebschen involved a consensual affair that ended in bitterness by the jilted lover:

> The facts in Huebschen, however, are easily distinguishable from those in this case. There, an office 'consensual romance'

> turned sour and the petitioner's conduct demonstrated an animus towards her 'former lover who had jilted her,' rather than general discrimination against the victim because of his sex. 716 F.2d at 1172. In addition, the Huebschen court distinguished its case from the facts in Woerner, supra. Woerner involved 'embarrassing and belittling remarks to the respondent female police officer, sexual advances made to her by a male petitioner, and harassment of male officers seeking to work with her,....' Id. There is no dispute that Volk immediately and continually rejected Tapen's alleged sexual advances, suggestive displays and crude remarks.

Id. at 1433.

The Sixth Circuit Court of Appeals distinguished Huebschen in the same way. See, Poe v. Haydon, 853 F.2d 418, 429 fn.6 (6th Cir. 1988), cert. denied, 109 S.Ct. 788 (1989); See also, Bertoncini v. Schrimpf, 712 F.Supp. 1336, 1341 (N.D. Ill. 1989); Skadegaard v. Farrell, 578 F.Supp. 1209 (D. N.J. 1984); and Woerner v. Brzeczek, 519 F.Supp. 517 (N.D. Ill. 1981).

Courts have repeatedly held that proof of discrimination against one individual is sufficient to state a violation of the equal protection clause so long as the respondent proves that she

was discriminated against on the basis of sex. In the case at bar, there was ample evidence that the basis for petitioner's conduct was respondent's sex. The jury found respondent suffered differential treatment due to her sex. Moreover, unlike Huebschen, petitioner did not offer any other reason for his conduct such as an attraction to some characteristic personal to Ms. Thompson. Instead, he denied Ms. Thompson's allegations.

B. Quid Pro Quo Sexual Harassment Constitutes A Separate Constitutional Violation Apart From Title VII

Petitioner concedes that sexual harassment violates the Equal Protection Clause of the Fourteenth Amendment, yet insists that one form of the harassment is outside its coverage, that is, the type that results in an adverse effect on one's job, or quid pro quo. Such a distinction is supported by no cases.

Specifically, the court in Lipsett v. University of Puerto Rico, 864 F.2d 881 (1st Cir. 1988), after engaging in an analysis of the development of sexual harassment claims under both Title VII and the Equal Protection Clause, held that quid pro quo sexual harassment constitutes a violation of the Equal Protection Clause. 864 F.2d at 896-97.

Similarly, the Tenth Circuit Court of Appeals recognized that sexual harassment constitutes a cause of action pursuant to the Equal Protection Clause, and held specifically that the petitioner's quid

pro quo firing of respondent violated §1983. Starrett v. Wadley, 876 F.2d 808 (10th Cir. 1989). Contrary to what petitioner argued, the Starrett court engaged in an analysis of the distinctions between hostile environment and quid pro quo sexual harassment holding the defendant county liable under §1983 for the termination of respondent, under a quid pro quo theory. Id., 876 F.2d at 820. See also, Bertoncini v. Schrimpf, supra and Skadegaard v. Farrell, supra.

In Volk v. Coler, supra, the respondent suffered adverse employment action as a result of her failure to submit to her employer's sexual demands, which was held to be actionable under 42 U.S.C §1983.

All of these cases involved quid pro quo sexual harassment, and all defendants in them were found to have violated the Equal Protection Clause. The touchstone of respondent's claims of quid pro quo sexual harassment is contained in the second and fourth subparts of the jury instruction. In addition to finding the petitioner's acts intentional, the jury found that petitioner subjected respondent to sexual harassment in the form of unwelcome advances or requests for sexual favors, the respondent's submission to which was a condition for receiving job benefits or the respondent's refusal to submit to the advances resulted in adverse employment actions. (Excerpt Transcript at 48, 49). The cases cited above all contain the elements to which Judge Kinneary referred as constituting quid pro quo sexual harassment.

1. Contrary To Petitioner's Assertion, Respondent's §1983 Claim Is Not Predicated On Title VII

Courts have held the constitutional right involved in this case, the right to be free of sex discrimination in the form of sexual harassment, does not derive from the proscriptions set forth in Title VII but rather from the Constitution. However, courts have held that it is appropriate to use Title VII analyses for equal protection claims. Sewell v. Jefferson County Fiscal Court, 863 F.2d 461, 466 (6th Cir. 1988), cert. denied, ___U.S.___, 110 S.Ct. 75 (1989); and Lipsett v. University of Puerto Rico, 864 F.2d 881, 897 (1st Cir. 1988) (court approved the use of Title VII analysis for claims under equal protection clause as well as Title IX). See also, Bohen v. City of East Chicago, Ind., supra, 799 F.2d at 1186.

Like the petitioner in the instant case, the defendant in Starrett, supra, a sexual harassment case, contended that a §1983 claim should not have been submitted to the jury, because it cannot be premised upon Title VII. The defendant's argument was rejected:

> ...plaintiff's Section 1983 claim is not predicated upon a violation of Title VII, but rather upon a violation of the First and Fourteenth Amendments. If a plaintiff can show a constitutional violation by someone acting under color of

> state law, then the plaintiff has a cause of action under Section 1983, regardless of Title VII's concurrent application.

Id. at 814 (citation and footnote omitted).

Petitioner's reliance on Day v. Wayne County Board of Auditors, 749 F.2d 1199 (6th Cir. 1984) is misplaced. After consideration of the Supreme Court's holdings in Johnson v. Railway Express Agency, 421 U.S. 454, 459, 95 S.Ct. 1716, 1719 (1975) and Great American Federal Savings & Loan Assn. v. Novotny, 442 U.S. 366, 99 S.Ct. 2345 (1979), the Sixth Circuit Court of Appeals held in Day that Title VII provided the exclusive remedy when the only §1983 cause of action was based upon a violation of Title VII. However, the court held that if the conduct violated the Constitution at the time of enactment of Title VII, the plaintiff may sue under 42 U.S.C. §1983. See also, Huebschen, supra. The court, relying on a section of the House Report on the 1972 Amendments to Title VII, stated that by extending coverage to state and local governments, the bill did not affect existing rights of public employees. Day v. Wayne County Board of Auditors, supra, 749 F.2d at 1204.

What distinguishes the instant case from Day, supra and Novotny, supra, is that those cases both involved claims of various types of retaliation, i.e. for filing Title VII charges (Day) and for support of female employee rights by a

male employee (Novotny). Protection from retaliatory acts by one's employer generally does not state a constitutional claim. The cause of action based upon retaliatory employer actions is created by Title VII itself.

Sexual harassment, unlike retaliation, violates constitutional rights in existence long before Title VII was enacted. As the court in Skadegaard, supra, stated: the plaintiff's Fourteenth Amendment constitutional rights are undeniably "independent" of those provided in Title VII and, in fact, pre-dated the creation of rights under its statutory scheme by close to one hundred years. Id., 578 F.Supp. at 1218.

In conclusion, none of the authorities cited by petitioner suggests that quid pro quo claims are only actionable under Title VII. Instead, quid pro quo sexual harassment on account of one's sex constitutes a violation of the Equal Protection Clause, a separate constitutional right predating 1972.

2. The Lack of Sexual Harassment Cases Reported Prior To 1972 Has No Bearing On Whether Sexual Harassment Constitutes A Claim Under The Equal Protection Clause

Petitioner argues in his petition that since there are no reported cases of instances of quid pro quo sexual harassment in violation of the Fourteenth Amendment prior to 1972, quid pro quo

sexual harassment violated no separate constitutional right or guarantee.[5] Petitioner's concession in his petition that hostile environment sexual harassment violates the Equal Protection Clause (Cert. Pet., at 10) belies his assertion that there must be reported cases prior to 1972 in order for there to be a pre-existing constitutional right.

Since 1972, courts have recognized that sexual harassment constitutes a violation of the Equal Protection Clause of the Fourteenth Amendment in both the quid pro quo and hostile environment context. Although courts have not always referred to quid pro quo harassment by name, it is apparent that defendants, in cases brought under the Fourteenth Amendment adversely affected the plaintiffs' employment and therefore committed quid pro quo sexual harassment.

C. The Personal Staff Exemption To Title VII Has No Bearing On Petitioner's Liability For Acts Of Sexual Harassment Pursuant To 42 U.S.C. §1983

Petitioner implies in his petition that since Congress carved out the

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[5] Petitioner fails to mention that no sexual harassment cases were reported prior to 1972. Tompkins v. Public Service Electric & Gas Co., 422 F.Supp. 553, 556 (D. N.J. 1976) rev'd, 568 F.2d 1004 (3rd Cir. 1977) (in which the district court noted that the first sexual harassment case brought was in 1974).

personal staff exemption to Title VII (42 U.S.C. §2000e(f)), he should likewise escape liability for his wrongdoing under §1983.

This Court rejected an argument nearly identical to petitioner's herein in Davis v. Passman, 442 U.S. 228, 247, 99 S.Ct. 2264, 2278 (1979) where it held that the constitutional claim of discriminatory discharge brought by a federal employee was not precluded by the Title VII exemption of congressional employees. Congressman Passman contended that because of 717 of Title VII [42 U.S.C. §2000e-16(a)], exempting noncompetitive congressional employees from its coverage, Congress explicitly intended to prohibit an employment discrimination suit by the respondent. This Court stated that the respondent was nevertheless entitled to avail herself of remedies, including constitutional ones, other than those provided by Title VII:

> In a similar manner, we do not now interpret §717 to foreclose the judicial remedies of those expressly unprotected by the statute. On the contrary, §717 leaves undisturbed whatever remedies petitioner might otherwise possess.

442 U.S. at 247, 99 S.Ct. at 2278.

In addition, in Starrett, supra, the district court dismissed respondent's Title VII claim on the basis of the personal staff exemption, but left undisturbed her §1983 equal protection

claims. Although the court of appeals reversed the lower court's dismissal of her Title VII claim, nowhere in its discussion of the personal staff exemption does the court even imply that the exemption has any effect on §1983 remedies. Id, 876 F.2d at 821.

CONCLUSION

For the foregoing reasons, the petition for Writ of Certiorari must be denied.

Respectfully submitted,

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